

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-13-597
)	
HAWAII GOVERNMENT EMPLOYEES)	DECISION NO. 456
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, AND ORDER
Complainant,)	
)	
and)	
)	
THOMAS R. KELLER, Administrative)	
Director of the Courts, The Judiciary, State of)	
Hawaii; NATHANIEL KIM, Support Services)	
Division Chief; and DAVID MAESHIRO, Chief)	
Information Officer, Information Technology)	
and Communications Division, State of Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 8, 2005, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed this prohibited practice complaint against THOMAS R. KELLER (KELLER), Administrative Director of the Courts, The Judiciary, State of Hawaii; NATHANIEL KIM (KIM), Support Services Division Chief, The Judiciary, State of Hawaii; and DAVID MAESHIRO, (MAESHIRO), Chief Information Officer, Information Technology and Communications Division (ITCD), The Judiciary, State of Hawaii (collectively Judiciary or Employer)¹ with the Hawaii Labor Relations Board (Board). Complainant alleges that in August 2002, the parties agreed to temporarily detail Velma Matsuda (Matsuda), Data Processing Systems Analyst VI, Client Services to the Strategic Planning and Special Projects Office in response to her concerns regarding a hostile workplace. Complainant alleges that Respondents also agreed to work with Matsuda to resolve the hostile workplace issues and come up with duties and responsibilities for her detailed assignment that were mutually agreeable to the parties. Complainant alleges that the list was never finalized and on February 16, 2005 Complainant informed Respondent KELLER that Matsuda wished to return to her permanent position

¹At the prehearing conference held on May 5, 2005, the parties stipulated to substitute KELLER, in his capacity as the Administrative Director of the Courts, as a Respondent as provided under HRS § 89-2, in lieu of the Honorable Ronald T. Y. Moon, Chief Justice of the Supreme Court, State of Hawaii.

effective February 22, 2005. Thereafter, Complainant alleges Matsuda met with Respondent MAESHIRO to discuss her transition back to the section and he attempted to dissuade her from returning. Complainant contends that Respondents have not returned Matsuda to her permanent position and are making it difficult for her to transition to her former position. Complainant contends that the Respondents committed prohibited practices in wilful violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8).

On May 5, 2005, the Board held a prehearing conference and set June 9, 2005 as the deadline for the filing of Respondents' dispositive motion and June 23, 2005 as the deadline for any memorandum in opposition thereto.²

On June 28, 2005, after hearing oral arguments on Respondents' Motion to Dismiss or in the Alternative, Motion for Summary Judgment, the Board majority denied the motion,³ because at the time the instant complaint was filed there existed material issues of fact in dispute as to whether Respondent MAESHIRO interfered with Velma Matsuda's (Mastuda) right to return to her permanent position in wilful violation of HRS §§ 89-13(a)(1), (5), and (7).

On July 18 and 19, 2005, the Board conducted hearings on the instant complaint.⁴ Both parties were represented by counsel and were given full opportunity to present evidence and argument to the Board. On September 1, 2005, Respondents filed their closing brief. On September 2, 2005, Complainant filed its post-hearing brief.

Based upon a thorough review of the record, the Board makes the following findings of fact by a preponderance of the evidence, conclusions of law and order.

FINDINGS OF FACT

1. The HGEA is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees included in Bargaining Unit (BU) 13

²At the prehearing conference, Complainant orally amended the complaint to withdraw the allegation of a breach of the collective bargaining agreement under HRS § 89-13(a)(8).

³On June 28, 2005, the Board majority was composed of Board Chair Brian Nakamura and Board Member Chester Kunitake. Board Member Racuya-Markrich dissented on the grounds that Complainant had already returned from her temporary assignment to her permanent position as the supervisor of the Client Services Section on or about May 2, 2005. Therefore, Member Racuya-Markrich believed the complaint was moot and the Board lacked jurisdiction over this case.

⁴On July 1, 2005, Board Member Emory J. Springer, replaced Board Member Chester Kunitake, and heard and examined all the evidence, to satisfy the requirements of HRS § 91-11.

(professional and other scientific employees, who cannot be included in any of the other bargaining units).

2. Respondent KELLER, in his capacity as the Administrative Director of the Courts, is the public employer in lieu of the Chief Justice of the Supreme Court, as provided in HRS § 89-2.
3. Respondents KIM, in his capacity as the Support Services Division Chief and MAESHIRO, in his capacity as Chief Information Officer (CIO), ITCD, are representatives of the public employer as defined in HRS § 89-2.
4. Matsuda is a member of BU 13 and is employed by The Judiciary as a Data Processing Systems Analyst VI at ITCD.
5. MAESHIRO is responsible for managing two projects: Strategic Planning & Project Management and the JIMS Project; and three branches of ITCD: the Court Systems Services, the Administrative Systems Services, and the Telecommunications and Network Services. The Telecommunications and Network Services Branch is organized into three sections: Client Services Section (CSS), Telecommunications Services Section, and Network Engineering & Management Section. Each of these sections is supervised by a Data Processing Systems Analyst VI.⁵
6. Historically, the ITCD came about through a reorganization in the early 1990s, when the Judiciary's Management Services which handled administrative support services for fiscal and personnel merged with the Judiciary Computer Systems. Interpersonal problems and bad feelings among the staff of both offices surfaced after the merger and creation of ITCD.
7. In an attempt to identify any perceived or actual problems within ITCD, Respondent KIM, as the Support Services Division Chief responsible for the overall administration and management of ITCD, undertook the task of interviewing all the employees and retained the services of an organizational psychologist, Dr. Morris Graham, to evaluate ITCD. In June of 2002, Dr. Graham reported to KIM that ITCD was "dysfunctional," and noted problems with leadership and communication.⁶
8. At the time of Dr. Graham's evaluation, Matsuda was the Data Processing Systems Analyst VI and supervisor of CSS. Under Matsuda's supervision, the

⁵See Complainant's Exhibit (Ex.) A.

⁶Transcript of Proceedings (Tr.), pp. 124-25, 127-29.

CSS experienced interpersonal problems which included hostilities towards Matsuda from individuals who perceived her as “vindictive, intimidating, overly demanding, and rigid.” For example, Matsuda recalled an incident where a co-worker, who later became her subordinate, threw a pager near her. As part of his report, Dr. Graham raised the concern that Matsuda’s staff was afraid of her. Dr. Graham recommended moving Matsuda to a specialty position.⁷

9. On or about April 2002, Matsuda contacted the HGEA regarding a hostile work environment.⁸ Thereafter, on April 30, 2002, HGEA’s Deputy Executive Director Randy Perreira (Perreira) met with KIM to resolve Matsuda’s complaint over a hostile work environment. During the meeting, the discussion centered on what kinds of work assignments Matsuda could be given, where she would be able to perform her job while not necessarily having to endure a hostile work environment.⁹ The parties discussed several alternatives, including the Union’s proposal to have Matsuda work from home on different projects and having her detailed to a different work unit.¹⁰
10. On July 29, 2002, Perreira and Matsuda met with KIM and MAESHIRO to attempt to resolve the situation.¹¹ Matsuda was asked if she was willing to be placed in a specialty position in the Strategic Planning Office.¹²
11. On July 31, 2002, Perreira informed KIM that Matsuda was willing to be temporarily detailed to the Strategic Planning Office to work on special projects.¹³ It was agreed that the temporary assignment would be for a period of one year beginning on or about August 11, 2002;¹⁴ KIM and MAESHIRO would work on providing Matsuda with a list of projects/tasks that she would

⁷Tr. pp. 40-41, 128-30.

⁸Tr. pp. 18-19, 20-22, 77-78.

⁹Tr. p. 79.

¹⁰Id.

¹¹Tr. p. 80.

¹²Tr. p. 131.

¹³Tr. pp. 24, 80-81.

¹⁴Tr. p. 26.

be assigned during the detail;¹⁵ Matsuda's responsibilities would be assumed by Richard Murakami, Telecom Branch Chief during the temporary detail, and Matsuda retained her right to return to her position at CSS if the temporary detail did not work out for either party.¹⁶

12. Before the temporary detail, Matsuda's major duties at CSS included supervision over staff responsible for two major functions of the organization. One function was the Helpdesk or customer care center to provide technology support to the Judiciary. The customer care center was intended as a one stop for the technology related needs for Judiciary personnel. The second function was the PC/LAN support which provided to Judiciary personnel technical assistance with their desktops and peripherals and the system administration of the local area network. In addition, CSS handled requests for procurement of technology-related equipment to provide quotes to the users working with vendors to configure servers, desktops and printers.¹⁷
13. Matsuda's one year temporary detail went by "without any major disruption." Attempts to obtain a list of assignments went without anything being provided.¹⁸ On or about July 9, 2003, Perreira wrote to Respondent KIM for an assessment and clarification of Matsuda's assignment, and requested a meeting to "develop an agreement outlining the Judiciary's expectations, as well as Ms. Matsuda's employment rights." Perreira described the need for a formal agreement as follows:

To date, there is no formal documentation to effectuate Ms. Matsuda's assignment and duties. While this has not proven to be a major problem during this past year, it is our expectation that such a formal assignment is necessary for the future. Ms. Matsuda is willing to continue in her detailed assignment capacity; yet, to protect her status and her position, some documentation is crucial. Such documentation should outline the expectations of Ms. Matsuda, as well as her primary job responsibilities. Ms. Matsuda remains committed to the goals of the Judiciary, but would certainly benefit from a more focused set of duties and responsibilities.

¹⁵Tr. pp. 28-29.

¹⁶Tr. pp. 80, 82, 91-93, 131-32, 163.

¹⁷Tr. p. 17.

¹⁸Tr. pp. 82-83.

As the Judiciary moves ahead with various initiatives that impact its organizational structure, there is a continued concern about Ms. Matsuda's encumbered position. To start, should you believe that Ms. Matsuda should not continue in this detailed assignment, she remains entitled to return to her supervisory position, which is potentially impacted in a reorganized division. Should you agree to maintain Ms. Matsuda in this assignment, it is our expectation that her permanent status will not be impacted, and her rights protected in the event that any organizational changes will impact her or her encumbered position.¹⁹ (Emphasis added.)

14. By letter dated July 14, 2003, Respondent KIM informed Perreira that MAESHIRO would contact his office to arrange a meeting. KIM further informed Perreira that the Judiciary was pleased with Matsuda's working arrangement and wanted to continue the temporary assignment on a "more permanent basis along with the proper documentation."²⁰
15. From December 2003 through February and March of 2004, HGEA Business Agent Waylen Toma and the Judiciary's Labor Relations Branch Chief Dee Wakabayashi exchanged lists of tasks describing Matsuda's duties and responsibilities working in the Strategic Planning and Project Management Office in an attempt to clarify Matsuda's duties and responsibilities while detailed to the Strategic Planning Office.²¹
16. By letter dated November 12, 2004, Perreira, informed Chief Justice Ronald T. Y. Moon that before the HGEA could "complete any meaningful consultation" on ITCD's reorganization proposal, Matsuda's long-pending status was "directly affected" by the reorganization and, therefore, needed to be resolved prior thereto.²² Perreira referred to Matsuda's concerns of a hostile work environment and the Union's proposal to resolve Matsuda's situation. Id. Perreira proposed a written memorandum of agreement to resolve Matsuda's status that would allow her to "telecommute as an employee of the

¹⁹Complainant's Ex. D

²⁰Complainant's Ex. E.

²¹Respondents' Exs. 1-3.

²²Complainant's Ex. F.

Planning Office, continuing to perform duties assigned by . . . [MAESHIRO] in her capacity as a DPSA VI.”²³

17. The parties were unable to reach an agreement to continue Matsuda’s temporary detail to the Strategic Planning Office on a permanent basis because the Employer did not agree to the Union’s proposal to allow Matsuda to telecommute.²⁴ The parties were unable to agree on the duties and responsibilities and other issues relating to Matsuda’s continued placement in the Strategic Planning Office. Consequently, by letter dated February 16, 2005, Perreira notified Respondent KELLER that Matsuda wished “to exercise her right to return to her position of Client Services Section Supervisor effective Tuesday, February 22, 2005.”²⁵
18. By letter dated February 18, 2005, Respondent KELLER responded to HGEA’s request to return Matsuda to her position in the Client Services Section and indicated that MAESHIRO would be meeting with Matsuda during the week of February 22, 2005 “to discuss her transition back to the Client Services Section.”²⁶ KELLER also assured Perreira that the “transition will be effectuated to afford Ms. Matsuda the opportunity to adjust to the changes that have occurred during her absence from the section.” Id.
19. On February 25, 2005, Respondent MAESHIRO met with Matsuda to discuss her transition. Although MAESHIRO knew the HGEA had invoked Matsuda’s right to return to her former position, he questioned Matsuda about her return and tried to talk her out of returning to CSS because he believed “it

²³Respondents’ Ex. 4.

²⁴Tr. p. 137.

See, Complainant’s Ex. G, wherein Perreira stated as follows:

It has been two years since Ms. Matsuda has functioned in her permanent position, but given the inability of the parties to reach a mutually agreeable resolution to the issues we have raised, we feel it is in Ms. Matsuda’s best interest to return to her position. We expect the ITCD management to work with Ms. Matsuda over the next several weeks to effectuate her transition back into her supervisory role, and to address staffing and other issues that result from her return. It is our expectation that in her capacity as supervisor of the Client Services Section Ms. Matsuda will continue to report to the Chief Information Officer, David Maeshiro.

²⁶Complainant’s Ex. H.

was not in the best interest of the organization [ITCD].”²⁷ When Matsuda asked MAESHIRO about a training class for the Helpdesk function the next day that CSS staff was also attending, MAESHIRO “strongly recommended” that she not attend because he did not believe that it was best “politically,” i.e., the individuals who set up the training could have questions about Matsuda’s attendance.²⁸ Matsuda did not attend the training.

20. On March 8, 2005, Respondent MAESHIRO met with Matsuda to discuss her transition back to CSS. Again he opined that returning to CSS was not in the best interests of the organization; asked Matsuda whether she really wanted to proceed with the return; and explained that it was not reasonable for her to expect a return to things exactly as they were when she was previously assigned there. At the end of the meeting, MAESHIRO handed Matsuda a two-page hard copy of a draft email, which he intended to send to the CSS staff to announce Matsuda’s transition back to CSS. In addition to listing the challenges involved and Matsuda’s role, MAESHIRO wrote a “guideline to the transition in an effort to level set expectations (sic) that are likely rooted based on the nature and role of the Client Services Section before being affected by” the significant changes and evolution of CSS. Following MAESHIRO’s “guideline” was a detailed outline of the chain of command, staff responsibilities as well as how to resolve any “conflicts or disagreements arising regarding the usage, or work assignments of subordinate personnel of the Support Services Section as well as the allocation of their work time.”²⁹

²⁷Tr. pp. 32, 208-12, 217.

²⁸Tr. pp. 31-34, 199-201, 212; Complainant’s Ex. H.

²⁹See Complainant’s Ex. B. MAESHIRO outlined management’s role and chain of command, including the delegation of authority to resolve any issues or conflicts as follows:

Velma Matsuda, as Supervisor within the Client Services Section shall report to CIO, David Maeshiro[.] A special project referred to as the Helpdesk shall be recognized with Richard Murakami, Branch Chief as the project manager and John Usui as the project leader. One of Velma’s assignments shall be to support this special project by working directly and cooperatively with the project manager to help ensure that the project continues on its present course toward successful completion. Velma shall also work cooperatively with the project leader and other project personnel. The project leader shall report to the project manager. Other project personnel, excluding Velma, shall report to the project leader. The employees assigned to Velma, as the client Services Section supervisor are Paul Halvorson, Nora Kato, Wallace Nishiguchi, and Wallace Miyasaki. Since these

21. Matsuda felt threatened and terrified after reading MAESHIRO's "guideline" found on paragraph two of page two, which reads as follows:

Velma Matsuda acknowledges that she is solely responsible for initiating this action, uncoerced, and takes full responsibility for any negative consequences, either real or perceived, that might come as a result of it including, but not limited to, any adverse behavior directed at her on the part of any Judiciary employee, either real or perceived, directed against her including hostility, antagonism, belligerence, other harassing behavior, or any other behavior of that sort, short of any actual physical injury directly caused by another Judiciary employee and shall hold no one else, including the Judiciary as an institution, liable for any actions of this sort.³⁰

same people have also been assigned to the Helpdesk project, they will continue in that capacity, but will report to Velma as the supervisor of the Client Services Section. This means that they will need to keep Velma informed of what they are doing or plan to do as needed or requested by the Client Services Supervisor. Any desire on the part of the Client Services Supervisor to change or alter any subordinate's work assignments associated with the Helpdesk project, or to otherwise redirect efforts or add assignments shall only be done after consultation and concurrence with the project manager and project leader of the Helpdesk project. Good faith efforts shall be made by all of the parties to resolve any issues that might arise. In the event the parties cannot resolve an issue amongst themselves, the issue shall be referred to the CIO for final resolution. As the Helpdesk project manager and Branch Chief of the Telecommunications and Network Services Branch, Richard shall determine the needs and direction of the Helpdesk project.

³⁰See, Complainant's Ex. B. Page one of MAESHIRO's email reads in part as follows:

ITCD has been asked to return Velma from her temporarily assigned position in the Strategic Planning and Special Projects Office to the Client Support Services Section. A number of challenges exist in this effort as a result of the rapid developments that have occurred since Velma has operated in her present capacity. The most significant are: The start of the JIMS project and the introduction of an entirely new computing platform for the Judiciary. . . . The continuing and near completion of the phasing out of the Wang computer systems[.] The continuing evolvement of the business planning team and process and the widening involvement of additional staff members in the more

Matsuda felt staff was being given a blank check to do whatever they wanted to her. Matsuda felt that MAESHIRO was reinforcing his desire not to have Matsuda return to her position as CSS supervisor. Matsuda understood MAESHIRO's message to be: "Back off, I don't want you back in your position. If you do come back, this is what you are going to be faced with."³¹

22. By letter dated March 9, 2005, HGEA's Executive Director Russell Okata (Okata) sent a letter to the Judiciary informing them of MAESHIRO's "guideline," and requesting that it not be distributed to the CSS staff. The next day, KELLER wrote to Okata to assure him that MAESHIRO "did not intend on disseminating the guidelines to co-workers but planned on verbally informing affected staff (subordinates and project leaders) that Ms. Matsuda would be returning to the Client Services Section as the supervisor and the major duties that she would be engaged in." KELLER agreed with Okata that the specific paragraph that upset Matsuda should never have been written and given to her. KELLER also told Okata that he "directed (MAESHIRO) **not** to disseminate this guideline to Ms. Matsuda's co-workers and that this guideline will be retracted immediately."³²
23. KIM reviewed MAESHIRO's draft email before it was given to Matsuda. Upon his review, KIM advised MAESHIRO that the paragraph (which Matsuda found to be threatening) was inappropriate and should not be left in.

critical issues that face the division[.] The implementation of the PeopleSoft HRMS which represents another significant kind of computing platform change with a whole other human resource re-tooling requirement[.] The establishment and filling of the Webmaster position [sic] and the resultant emphasis on browser-based technology including the direction toward the establishment of a web portal[.] The near completion of the data communications portion of the Network Plan and significant progress on the telephony [sic] portion of the plan[.] The establishment of technical resources and expertise in other court locations[.] The establishment of a "Helpdesk" special project that was identified by the business planning team that, right after JIMS, is perhaps the most important project to ITCD. In support of this critical project came the implementation of the Computer Associates Unicenter product, a large, complex, robust Helpdesk software support solution[.] . . .

³¹See Complainant's Ex. B; Tr. pp. 43-44.

³²Respondents' Ex. 9.

KIM was shocked to learn that MAESHIRO gave Matsuda the email unedited. KIM met with MAESHIRO and instructed him to apologize to Matsuda.³³

24. On or about March 15, 2005, KIM and MAESHIRO met with Matsuda at which MAESHIRO formally apologized to Matsuda and retracted the “guideline” email. MAESHIRO expressed an intent to move forward and not delay Matsuda’s transition back to CSS.³⁴
25. On March 22, 2005, MAESHIRO emailed to Matsuda his notes of points covered at the March 15, 2005 meeting which Matsuda had asked to see.³⁵ The six points covered: Matsuda’s return to the CSS; the chain of command for resolving any Helpdesk issues with John Usui as the Helpdesk project leader and Richard Murakami as the overall project manager; a list of employees under Matsuda’s supervision; Matsuda’s responsibility as the Hawaii Criminal Justice Data Center technical coordinator; her responsibility to provide training to users, and other communications-related items such as helping the division facilitate further knowledge of technology usage.³⁶
26. On or about March 23, 2005 to April 22, 2005, Matsuda went on emergency vacation funeral leave. She returned to work on April 23, 2005.³⁷
27. On April 8, 2005, the HGEA filed the instant prohibited practice complaint alleging, inter alia, that MAESHIRO’s conduct and actions interfered with Matsuda’s right to return to her position as CSS supervisor, and that the Judiciary was engaged in bad faith bargaining in wilful violation of HRS §§ 89-13(a)(1), (5) and (7).
28. On April 12, 2005, KELLER reminded MAESHIRO that the Judiciary needs “to move forward with effectuating [Matsuda’s] return as the supervisor of the Client Services Section.” KELLER “directed [MAESHIRO] to return Ms. Matsuda to the Client Services Section immediately upon her return to work.”³⁸

³³Tr. pp. at 156-63.

³⁴Tr. pp. 206-07, 275.

³⁵See Respondents’ Ex. 10, Tr. p. 208.

³⁶Id.

³⁷Tr. p. 47.

³⁸Complainant’s Ex. I.

29. MAESHIRO did not effectuate Matsuda's return as supervisor of CSS until on or about May 2, 2005 because he found it hard to transfer supervisory responsibility away from Richard Murakami and John Usui, who both filled in as supervisors for Matsuda during her two-year absence and oversaw the changes to both the Helpdesk software and PC/Lan functions.³⁹ As a result of a reorganization at ITCD, Matsuda's CSS section was reduced from six to four staff. The priority project for CSS staff involves the Helpdesk function above other CSS functions. For the transition to be complete, MAESHIRO needs to provide Matsuda and her staff the necessary training for the new Helpdesk software and the JIMS Technical Helpdesk, which he intends to provide by the end of the year.⁴⁰ In addition, MAESHIRO has yet to work out the "specific assignments" and determine how Matsuda and Richard Murakami will share responsibilities over staff involved in the PC/LAN function.
30. The Board finds that MAESHIRO interfered with or restrained Matsuda from exercising her right to return to her permanent position as CSS supervisor in the course of meeting with her on February 25, 2005 and discouraged her from attending a training class for the Helpdesk function; and on March 8, 2005 when he issued the "guidelines" that included offensive and coercive language written to threaten and scare Matsuda from exercising her right to return to her permanent position as CSS supervisor. The Board finds that the language contained in the paragraph 2, page 2 of the email threatened Matsuda to assume all responsibility for any hostile behavior or untoward act, short of physical injury, which she may suffer and for which the Judiciary would not be "liable." The threat of reprisal for exercising her right to return to her CSS supervisor position is clear.

DISCUSSION

The gravamen of the Union's complaint is that Respondents interfered with the protected rights of Matsuda, a Data Processing Systems Analyst VI and engaged in bad faith bargaining in wilful violation of HRS §§ 89-13(a)(1), (5) and (7).⁴¹

³⁹Tr. pp. 208-12, 228-31.

⁴⁰Tr. p. 210.

⁴¹HRS § 89-13 provides in relevant part:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

The HGEA contends the violations occurred on or after February 16, 2005, when Complainant informed Respondents that Matsuda wished to return to her permanent position as the supervisor of the CSS following a two-year temporary detail to the Strategic Planning and Special Projects Office. The Union alleges that when Matsuda was temporarily detailed to the Strategic Planning Office for a period of one year it constituted a change in her conditions of work mutually agreed to by and between the HGEA, Matsuda and Respondents KIM and MAESHIRO. The Union alleges that Matsuda's right to return to her permanent position at CSS was part of the agreement that was consistent with Article 4.B of the BU 13 collective bargaining agreement and HRS §§ 89-1, 89-3 and 89-9(a).⁴² The Union alleges that Respondents committed a prohibited practice by interfering with, coercing, and/or restraining Matsuda from exercising her right to return to her permanent position when Respondent MAESHIRO in the course of meeting with Matsuda, repeatedly made statements to dissuade her from returning, discouraged her from attending a training class on the Helpdesk function, and issued an offensive and coercive "guideline" that was intended to threaten and scare Matsuda from exercising her return rights to CSS.

In its motion to dismiss, Respondents argued that Matsuda had been returned to her CSS supervisor position on or about May 2, 2005, and therefore the instant complaint was moot. In its closing brief, Respondents contend that the Union failed to prove any interference as defined by the Hawaii Supreme Court in Hawaii State Teachers Association v. Hawaii Public Employment Relations Board, 60 Haw. 361, 364, 590 P.2d 993 (1979), or present evidence that Respondents interfered with any protected rights established under HRS § 89-3.⁴³

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- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
* * *
 - (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
* * *
 - (7) Refuse or fail to comply with any provision of this chapter;

⁴²Article 4.B provides in part that: "No changes in wages, hours, or other conditions of work contained herein may be made except by mutual agreement." See Complainant's Ex. J.

⁴³HRS § 89-3, refers to the rights of employees and provides as follows:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid

Respondents argue that Matsuda's temporary assignment was a legitimate exercise of management's rights as provided under HRS § 89-9(d), which resulted from informal discussions to address interpersonal conflicts within the ITCD and CSS, in particular. Respondents contend the temporary assignment was not a product of any formal negotiations or consultations and there was no agreement covered under HRS Chapter 89 or the collective bargaining agreement. Alternatively, Respondents contend that Matsuda returned to work as the CSS supervisor on or about May 2, 2005, and that prior to her return MAESHIRO met with Matsuda on two occasions. MAESHIRO did not deny Matsuda's request to attend the Helpdesk training, but told her she could attend if she wanted. While admittedly MAESHIRO's "guideline" language was inappropriate, Respondents argue that it was not intended to intimidate or coerce Matsuda and a major portion of the email contained a lengthy discussion about the challenges ahead and Matsuda's role and responsibilities upon her return. MAESHIRO apologized and retracted the guideline immediately, and did not distribute it to other CSS staff. On March 22, 2005, the day before Matsuda began a one month leave of absence, MAESHIRO sent a copy of his talking points which covered what her role and responsibilities would be when she returned as CSS supervisor.

Respondents do not dispute that Matsuda's right to return to her permanent supervisory position was part and parcel of the agreement that resulted from informal discussions by and between HGEA and Respondents KIM and MAESHIRO to change Matsuda's conditions of employment with a temporary detail in order to address Matsuda's complaints of a hostile work environment. In 2003, after a one-year trial period, the HGEA sought to clarify Matsuda's status by making the assignment permanent and committing the change to a written agreement. At that time, the HGEA indicated that Matsuda "remains entitled to return to her supervisory position. . . ." At no time did the Employer disagree with the Union's assertion that Matsuda was entitled to return to her permanent position. Ultimately, the Union and Employer were unable to reach an agreement to permanently change Matsuda's assignment because, inter alia, the Employer could not agree to have Matsuda telecommute.

On February 16, 2005, when KELLER was notified by Perreira that Matsuda "wishes to exercise her right to return to her position of Client Services Section Supervisor effective Tuesday, February 22, 2005[,] KELLER confirmed in writing that MAESHIRO would be meeting with Matsuda during the week of February 22, 2005 "to discuss her transition back." KELLER also assured Perreira that the "transition will be effectuated to afford Ms. Matsuda the opportunity to adjust to the changes that have occurred during her absence from the section."

or protection, free from interference, restraint, or coercion. . . .

Based on this record, the Board finds that Matsuda's return to her permanent CSS supervisory position was a right mutually agreed to and consistent with the rights of employees recognized under the collective bargaining agreement and HRS § 89-3. Therefore, Matsuda's temporary assignment constituted a change in Matsuda's conditions of employment that was negotiated and mutually agreed to between the Union and Employer. Accordingly, Matsuda retained her right to return to her permanent supervisor position at CSS, if the temporary assignment did not become permanent.

Under HRS § 89-13(a)(1) it is a prohibited practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by HRS Chapter 89. HRS § 89-3 guarantees employees the right to self organize, to form, join or assist labor organizations, to bargain collectively with the representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employer conduct that interferes with, restrains, or coerces employees in the exercise of these rights violates HRS § 89-13(a)(1). The test is whether the employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. See, Decision No. 404, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB 72 (2000) (United Public Workers) citing Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 164, 117 LRRM 1260 (1984).

In United Public Workers, *supra*, the Board discussed HRS § 89-13(a)(1) as follows:

The Board discussed § 89-13(a)(1), HRS, in Decision No. 50, Hawaii Federation of College Teachers, Local 2003, 1 HPERB 464 (1974). The Board considered whether an Assistant Vice Chancellor's encouragement of a "no representation" vote constituted a prohibited practice. The Board held that an employer had the right to express opinions and persuade its employees to join or not to join a union under the First Amendment as part of the exercise of freedom of speech and freedom of assembly as long as the expression was not coupled with coercion. The Board stated:

Section 89-13(a)(1), HRS, is patterned after Section 8(a)(1) of the National Labor Relations Act. Congress was dissatisfied with the NLRB's rulings in the free speech area based on Section 8(a)(1) and enacted more definitive language under Section 8(c) to clarify that an employee is interfered with, restrained or coerced when the employer expresses views, argument or opinion only if the expression contains a threat of

reprisal or force or promise of benefit. Southwire Co. v. NLRB, 383 F.2d 235, 65 LRRM 3042 (5th Cir. 1967). More recently and more explicitly, the Supreme Court defined the scope of permissible employer communications. NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969).

See, United Public Workers, Decision No. 404 at 74-75.

In the instant case, the Union established by a preponderance of evidence that MAESHIRO engaged in conduct that “reasonably tended to interfere” with Matsuda’s right to return to her permanent supervisor position at CSS. On more than one occasion, MAESHIRO attempted to talk Matsuda out of returning to ITCD, because in his opinion Matsuda’s return to CSS was not in her best interest, nor in the best interest of the ITCD organization given the interpersonal problems that existed in the past. When Matsuda asked to attend a training class for the Helpdesk function software, which was the priority function for CSS, MAESHIRO “strongly recommended” against it primarily out of concern about staff reaction to Matsuda’s attendance. As a result, Matsuda did not attend.

In the second meeting, on March 8, 2005, MAESHIRO gave Matsuda a two-page email which not only detailed the significant changes and evolution of CSS during her two-year absence, but included a paragraph which by MAESHIRO’s own admission was offensive and coercive. The Board finds that the language contained in the paragraph, threatened Matsuda to assume all responsibility for any hostile behavior or untoward act, short of physical injury, which she may suffer and the Judiciary will not be “liable.” The threat of reprisal for exercising her right to return to her CSS supervisor position is clear. KIM reviewed MAESHIRO’s draft email before it was given to Matsuda. Upon his review, KIM advised MAESHIRO that the paragraph which Matsuda found to be threatening was inappropriate and should not be included. KIM was shocked to learn that MAESHIRO had given Matsuda the email unedited.

Furthermore, even after MAESHIRO was directed to retract the guideline, and apologize to Matsuda on March 15, 2005, MAESHIRO continued to delay Matsuda’s return to CSS. On April 12, 2005, four days after the filing of the instant complaint, Respondent KELLER “directed [MAESHIRO] to return Ms. Matsuda to the Client Services Section immediately upon her return to work.” On April 23, 2005, Matsuda returned to work after a one month funeral leave of absence. The only explanation MAESHIRO could provide for the delay was that he found it hard to transfer supervisory responsibility away from Richard Murakami and John Usui, who had both filled in as supervisors for Matsuda during her two-year absence.

In United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507, (1984), the Board held that wilfulness can be inferred from the circumstances of the case and can be presumed where the violation occurred as a natural consequence of the party's actions. Based on the evidence in the record, the Board finds that the natural consequence of MAESHIRO's actions in failing to effectuate Matsuda's transition back to her permanent position interfered with her right to return. Although MAESHIRO had the right to express his opinion that Matsuda's return to CSS was not in her best interest, nor in the best interest of the organization, his conduct rose to the level of a prohibited interference when he issued the "guidelines" containing threats and coercive language. The Board also infers wilfulness based on MAESHIRO's repeated attempts to dissuade Matsuda from returning to her permanent position and discouraging her from attending necessary training on the Helpdesk software for no other reason than staff raising questions about her attendance. Accordingly, the Board concludes the Employer has committed a prohibited practice under the provisions of HRS §§ 89-13(a)(1) and (7).

The Union also argues that the Employer breached the duty of good faith bargaining by interfering with restraining, and/or coercing Matsuda from exercising her right to return to her CSS supervisory position, constituting a wilful violation of HRS § 89-13(a)(5). After considering the arguments of the Union, the Board is unable to conclude on this record that under the circumstances of this case, the Employer engaged in bad faith bargaining by refusing to return Matsuda to her permanent position. Therefore, the Board majority concludes that the Union failed to carry its burden of proving that Respondents violated HRS § 89-13(a)(5).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject complaint pursuant to HRS §§ 89-5 and 89-14, HRS.
2. An employer violates HRS § 89-13(a)(1) by interfering, restraining, or coercing any employee in the exercise of any right guaranteed under Chapter 89.
3. An employer violates HRS § 89-13(a)(7) by refusing or failing to comply with any provision of Chapter 89.
4. The Board majority concludes that based on the preponderance of evidence the Employer committed a prohibited practice in wilful violation of HRS §§ 89-13(a)(1) and (7) when MAESHIRO failed to effectuate, and engaged in conduct reasonably intended to interfere with, Matsuda's right to return to her permanent position as the CSS supervisor.

Matsuda's return to her permanent position occurred within thirty days from the filing of the instant complaint on April 12, 2005. Complainant did not dispute that Matsuda was "placed back to the supervisor position at Client Services Section on May 2, 2005," shortly after returning from her one month leave of absence which began on March 22, 2005 and ended April 25, 2005.⁴⁵ Instead, Complainant's admitted that although Matsuda was placed back in her CSS supervisor position, she did not believe she had been returned to her position because "her roles and responsibilities have not been clearly defined."⁴⁶ However, the Board Majority failed to understand that defining Matsuda's assignment back to her permanent position falls within the purview of management's rights and did not raise a material issue of fact in dispute. Based on the record before the Board on June 28, 2005, and drawing all inferences in favor of the Union as the non-moving party, there was no material issue of fact in dispute that Matsuda's temporary assignment in the Strategic Planning Office had ended, and she had been reassigned to her permanent position as the CSS supervisor on May 2, 2005.

The Board majority chose instead to find material issues of fact in dispute as to whether MAESHIRO's conduct and the issuance of his email "guidelines" constituted an unlawful interference prohibited under HRS § 89-13(a)(1). The Board majority completely ignored the fact that Respondents did not dispute for the most part, MAESHIRO's conduct and actions in the course of two meetings on February 25, 2005, and March 8, 2005, and the issuance of his email and the threatening and coercive language contained within his "guidelines." More importantly, there was no dispute that on March 10, 2005, the Administrative Director of the Courts immediately responded to the March 9, 2005 request not to disseminate the guideline received from HGEA Executive Director Okata. KELLER confirmed that MAESHIRO had been directed to retract the guideline and apologize to Matsuda.⁴⁷ Contrary to the Board majority's findings, I would have drawn all inferences to find that even though MAESHIRO's conduct may have risen to the level of a prohibited interference, the retraction of the guidelines and apology to Matsuda, as directed by KELLER in response to the Union's request to not distribute the guideline, coupled with Matsuda's placement back to her permanent position as the CSS supervisor on May 2, 2005, rendered the instant complaint moot since there were no remaining issues for determination and the

⁴⁵See, Board Ex. 7, Respondents' Motion to Dismiss, or in the alternative, Motion for Summary Judgment; Memorandum in Support of Motion; Declaration of Nathaniel H. C. KIM; Declaration of Lynn Inafuku; Exhibits "1" - "7".

⁴⁶See, Board Ex. 8, Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss, or in the alternative, Motion for Summary Judgment, Filed June 9, 2005, p.5.

⁴⁷See, Board Ex. 9, Declaration of DAVID MAESHIRO.

case lost its character as a present, live controversy. Kona Old Hawaii Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987).⁴⁸

In Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 616 P.2d 201 (1980), the Court dismissed the action on grounds of mootness, stating:

The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of the litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal “adverse interest and effective remedy” have been compromised. Id., at 394.

I also disagree with the Board majority’s presumption of wilfulness based solely on MAESHIRO’s conduct. In Aio v. Hamada, 66 Haw. 401, 664 P.2d 727 (1983), the Hawaii Supreme Court commented upon the definition of “wilfully,” within the meaning of Chapter 89, HRS, as follows:

Turning to appellants’ assertion that HPERB incorrectly interpreted ‘wilfully’ as it is employed in HRS § 89-13(b), we observe at the outset that the related legislative history is devoid of any reference thereto. HPERB thus logically sought aid from a dictionary, and relying on the discussion of the pertinent term in Black’s Law Dictionary ruled, ‘that to make out a prohibited practice under Subsection 89-13(b) HRS, conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS, must be proven.’ We have no reason to reject the construction.

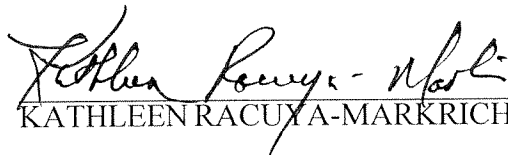
Since Aio, however, this Board has held that “wilfulness can be presumed where a violation occurs as a natural consequence of a party’s actions.” Consequently, the presumption of wilfulness has become the standard applied by the Board for the past two

⁴⁸Based on these factual circumstances, the exception to the mootness doctrine does not apply to Matsuda, because it cannot be said that Respondents’ alleged failure to transition Matsuda back to her permanent position as supervisor of the Client Services Section is capable of repetition yet evading review. Okada Trucking Co. Ltd. v. Board of Water Supply, 99 Hawai’i 191, 196-98, 53 P.3d 799, 804-06 (2002).

decades. See, e.g., Decision No. 194, United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984); Decision No. 374, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570, 583-84 (1996); Decision No. 443, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 319, 334 (2003).

The Board majority fails to properly apply the presumption of wilfulness standard by considering only the conduct of MAESHIRO. Both KELLER and KIM are named parties to the instant complaint, and no interference occurred as a natural consequence of the Employer's directives to MAESHIRO to retract the guidelines and apologize to Matsuda. When the Union informed the Employer about MAESHIRO's guideline and requested that it not be distributed, the Employer complied immediately.

On March 10, 2005 KELLER assured the HGEA's Executive Director that MAESHIRO "had been directed **not** to disseminate this guideline to Ms. Matsuda's co-workers and that this guideline will be retracted immediately." Indeed, the Employer agreed with the Union that the offensive paragraph in MAESHIRO's guideline "should never have been cited and given to Ms. Matsuda."⁴⁹ Had the Employer refused or failed to comply with the Union's request regarding distribution of MAESHIRO's guideline, there would be a basis on which the Board majority could conclude the Union met its burden to show the Employer committed a prohibited practice in wilful violation of HRS § 89-13(a)(1). But the Employer's conduct does not show a "conscious, knowing and deliberate intent to violate Chapter 89, HRS." Nor can the Board majority presume wilfulness to make out a prohibited practice based on MAESHIRO's conduct and the issuance of his guidelines, when the natural consequence of the Employer's compliance with the Union's request; directives to MAESHIRO to retract and apologize to Matsuda; MAESHIRO's March 15, 2005 meeting with Matsuda at which he articulated the chain of command, the list of employees under her supervision, and her role and responsibilities; and placement back to her CSS supervisor position on May 2, 2005, demonstrate that no interference occurred. For these reasons, I would have dismissed the instant complaint on the grounds of mootness, as well as found that the Union failed to prove by a preponderance of evidence that the Employer committed a prohibited practice by interfering with Matsuda's right to return to the CSS supervisory position in wilful violation of HRS §§ 89-13(a)(1) and (7). I do concur with the Board majority's conclusion that the Union failed to prove the Employer engaged in bad faith bargaining in wilful violation of HRS § 89-13(a)(5).


KATHLEEN RACUYA-MARKRICH, Member

⁴⁹Respondents' Ex. 9.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO v.
THOMAS R. KELLER, et al.
CASE NO. CE-13-597
DECISION NO. 456
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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